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in the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 22

MORTIMER NORMAN KORAN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Petition For Writ of Certiorari To the District Court of Appeal of Florida, Third District

H. ROBERT KOLTNOW &
GERALD KOGAN
Attorneys for Petitioner
1201 Biscayne Building
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Miami, Florida 33130

MIAMI REVIEW — 371-4853 — 377-3721

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1968

No. _____

MORTIMER NORMAN KORAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petition For Writ of Certiorari To the District Court of Appeal of Florida, Third District

---

Petitioner prays that a writ of certiorari issue to review the decision and judgment of the District Court of Appeal of Florida, Third District.

OPINION BELOW

The Opinion of the District Court of Appeal of Florida, Third District, affirming Petitioner's conviction, is reported in 213 So.2d 735, (Fla. App. 1968), and may be found in Appendix G.

GROUNDS FOR JURISDICTION

The Sentence and Judgment of conviction of the Criminal Court of Record in and for Dade County, Florida was entered on November 30, 1967. (Appendix C). The Opinion of the District Court of Appeal of Florida, Third District, affirming Petitioner's conviction, was entered on August 20, 1968 (Appendix G). Said Court's Order Denying Petition For Rehearing was entered on September 24, 1968 (Appendix H). The Supreme Court of Florida denied a Petition for Writ of Certiorari on January 23, 1969. (Appendix I), and denied the Petition for Rehearing on February 27, 1969 (Appendix J).

The Jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3), because a title, right, privilege or immunity claimed under the Constitution of the United States was denied by the District Court of Appeal of Florida, Third District.

QUESTION PRESENTED

Though the electronic surveillance of Petitioner occurred prior to the decision in Katz vs. United States on December 18, 1967, does the introduction into evidence of tape recordings of oral and telephone conversations of Petitioner, when Petitioner elects not to testify at his trial, constitute a violation of his rights under both the Fourth and Fifth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensations.

AMENDMENT XIV

SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wheren they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA

SECTION 12-DOUBLE JEOPARDY: SELF-INCRIMINATION: EMINENT DOMAIN: RIGHT TO WORK

No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employe-.

SECTION 22-SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

TITLE 28

UNITED STATES CODE

SECTION 1257 (3)

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: By Writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

In June, 1966, Petitioner was a printer engaged in the printing business in Hallandale, Broward County, Florida. A United States Secret Service Agent, while conducting an investigation of counterfeit currency, devised a plan by which he would attempt to entice Petitioner into printing counterfeit currency and Florida drivers' licenses. Pursuant to the agent's plan, an informer was equipped with an electronic eavesdropping device on his person, and was sent to Petitioner's place of business in Hallandale to discuss the above counterfeiting plan. Their conversation was overhead and recorded by the agent who stationed himself nearby but outside Petitioner's premises. (R. 4A-9A).

The next day, at the agent's instructions, the informer telephoned Petitioner, at his place of business. The telephone used was equipped with an electronic eavesdropping device, and the conversation was overhead by the agent and likewise recorded. (R. 8A-11A). The informer arranged a meeting between Petitioner and the agent, who would act in an undercover capacity as a buyer of counterfeit currency and drivers' licenses. The agent, in his undercover capacity and also equipped with an electronic eavesdropping device on his person, met with the informer and Petitioner, and their conversations were overheard and recorded by other police officers stationed nearby, but out of view, who recorded same. (R. 16-23).

During the next few days, the agent initiated several telephone calls to Petitioner at his place of business, and the telephone used by the agent was equipped with an electronic eavesdropping device. These telephone conversations were likewise recorded without Petitioner's knowledge. (R. 31-33). A meeting was arranged during these telephone conversations for the delivery of the counterfeit drivers' licenses from the Petitioner to the agent, and Petitioner was arrested at said meeting. (R. 34, 36).

Petitioner was charged by Information with violation of Florida Statutes 322.212(1) Unlawful Possession of Counterfeit Drivers' Licenses (Appendix A). Prior to the trial, Petitioner filed his Motion To Suppress, which was primarily directed toward (1) the oral conversation between the informer and Petitioner at Petitioner's place of business, (2) the oral conversations between the agent, the informer and Petitioner, not at Petitioner's place of business, and (3) the telephone con-

versations between the informer and the agent, on the one hand, and Petitioner, which calls were made to, not from, Petitioner at his place of business. (R. 167-168). The Trial Court granted the Motion To Suppress with regard to the conversations between the informer and Petitioner, but denied the Motion with regard to all other oral and telephone conversations. (R. 47A, 13-14).

Petitioner was tried by the Criminal Court of Record in and for Dade County, Florida, and during the trial, the prosecution introduced testimony of government agents as to all of the unsuppressed oral and telephone conversations of Petitioner, and in addition, tape recordings of all of said oral and telephone conversations, which were played to the jury over Defendant's objections and renewal of his Motion To Suppress (R. 83-85). These tape recordings were considered to be of such importance to the Jury that they asked that same be played again during their deliberations (R. 155).

Petitioner did not testify, nor was the informer produced as a witness by the prosecution, at either the Hearing on the Motion To Suppress, or at the Trial.

Petitioner was found guilty and sentenced to a term of three years in the State Penitentiary (Appendix C).

From this Judgment and Sentence, Petitioner filed his Notice of Appeal to the District Court of Appeal of Florida, Third District (Appendix E).

As a result of the same surveillance and investigation herein, Petitioner was charged by the United States authorities for various offenses relating to counterfeit

currency. Petitioner was tried and convicted in the United States District Court For The Southern District Of Florida, and the identical tape recordings were admitted into evidence by the Trial Court. The United States Court of Appeals for the Fifth Circuit affirmed the conviction in **Koran vs. United States of America,** —— F. 2d —— (5th Cir. 1969), and a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit is being filed in this Court simultaneously with the filing of this Petition. The same question is involved in both cases.

HOW THE FEDERAL QUESTIONS WERE RAISED

Prior to Trial, the federal questions were raised in Petitioner's Motion To Suppress such evidence which was obtained contrary to the Constitutions of the State of Florida and of the United States (Appendix B). The Trial Court granted the Motion with regard to the oral and telephone conversations between the informer and Petitioner, but denied the Motion with regard to all other of Petitioner's oral and telephone conversations. (R. 47A, 13-14).

The federal questions were raised during the trial, when the tape recordings were introduced into evidence and played to the jury over Petitioner's objections and renewal of his Motion To Suppress. (R. 83-85).

The federal questions were raised after the Trial by Petitioner's Motion for New Trial (Appendix D), which was denied by the Trial Court on November 30, 1967 (R. 177).

The federal questions were raised in Petitioner's Assignments of Error filed in the District Court of Appeal of Florida, Third District, (Appendix F), in the Brief of Appellant, and in the Petition For Rehearing in said Court, which was denied on September 24, 1968. (Appendix H).

The federal questions were likewise raised in the Petition for Writ of Certiorari, filed in the Supreme Court of Florida, as well as in the Petition For Rehearing in said Court, which was denied on January 23, 1969 (Appendix I), as well as in the Petition For Rehearing, which was denied on February 27. (Appendix J).

REASONS FOR GRANTING THE WRIT

There is now no question that the Government's electronic activities in the instant case were clearly violative of Petitioner's constitutional rights and also violative of federal statutes.

Petitioner's conviction undoubtedly would have been set aside under the doctrine set forth in **Lee vs. State of Florida,** 392 U.S. 378, 88 S.Ct. 2096 (1968), that such activity was in violation of Section 605 of the Federal Communication Act, but for the prospective application of such rule in **Fuller vs. State of Alaska,** 393 U.S. 80, —— S.Ct. —— (1969).

In addition, Petitioner's conviction also undoubtedly would have been set aside under the doctrine set forth in **Katz vs. United States,** 389 U.S. 347, 88 S.Ct. 507 (1967), that such surveillance was in violation of rights under

the Fourth Amendment, but for this Court's pronouncement in **Desist vs. United States,** —— U.S. —— (March 24, 1969) that **Katz** also "should be accorded only prospective application."

There are, however, major factual differences between the present case and **Desist,** wherein it is submitted the harsh and unjust rules of **Desist** are not applicable because of the Fifth Amendment question.

Desist was not clear as to whether the Defendants therein did or did not testify in their own behalf, other than this Court's pronouncement "an important part of the Government's evidence consisted of tape recordings of conversations among several of the Petitioners in a New York City hotel room." The lower Court, however, indicated that several of the Defendants offered affirmative testimony and evidence, including an alibi, which may well have included direct testimony by the Defendants.

It is Petitioner's contention that the Fifth Amendment demands a Defendant should "not be compelled in any criminal case to be a witness against himself." To give full meaning to the rights created under such Amendment, the illegally seized tape recordings of oral and telephone conversations of Petitioner, which contained many incriminating statements by Petitioner, should not have been introduced into evidence and played to the jury, until and unless Petitioner elected to testify at the trial. In the event Petitioner waived his rights and did elect to testify, the tape recordings could then be introduced into evidence to impeach the testimony of Petitioner.

If the above were not the rule, then Courts are merely giving lip service to a defendant's Fifth Amendment rights, in that the practical effect, as was the case here, would be to permit the jury to actually hear a Defendant's own incriminating statements convict him, when he has not yet had the opportunity to make an intelligent decision whether to make or not to make any statement.

In **Berger vs. State of New York**, 388 U.S. 41, 87 S.Ct. 1873 (1967), Justice Douglas, in his concurring opinion, stated at page 67:

> "The words that a man says consciously on a radio are public property. But I do not see how government using surreptitious methods can put a person on the radio and use his words to convict him. Under our regime, a man stands mute if he chooses, or talks if he chooses. The test is whether he acts voluntarily. That is the essence of the face of privacy protected by the 'mere evidence' rule. For the Fourth Amendment and the Fifth come into play when the accused is 'the unwilling source of the evidence' . . . There being no difference 'whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers . . .
>
> " . . . in short, I do not see how any electronic surveillance that collects evidence or provides leads to evidence, is or can be constitutional under the Fourth and Fifth Amendments . . ."

This Court has gone to great extreme to extend Constitutional rights of Defendant outside the courtroom by limiting the use of extrajudicial statements made by such Defendant. In **Miranda vs. State of Arizona**, 384 U.S. 436, 86 S.Ct. 1602 (1966), this Court stated at Page 459:

> " . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'."

Further this Court in **Linkletter vs. Walker**, 381 U.S. 618, 85 S.Ct. 1731, (1965), discussed the retrospective application of new criminal rules, and stated at P. 1743:

> " . . . finally in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the **fairness of the trial** . . . " (Emphasis Added)

And, in **Desist,** this Court stated the exclusionary rule under the Fourth Amendment is but a "procedural weapon that has no bearing on guilt" and "the fairness of the trial is not under attack."

Petitioner submits that if a defendant elects not to testify, the prosecution has the burden of carrying forward the prosecution without the defendant's own voice and words making up the primary evidence for his conviction. It is respectfully submitted that the "fairness of the trial" is clearly under attack if such a procedure is used.

CONCLUSION

Petitioner respectfully submits that pre-**Katz** law would recognize clearly that the illegally obtained evidence used to convict Petitioner herein constituted a violation of his rights under the Constitution of the State of Florida, and the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

H. ROBERT KOLTNOW &
GERALD KOGAN
Attorneys for Petitioner
1201 Biscayne Building
19 West Flagler Street
Miami, Florida

By _____

APPENDIX

APPENDIX A

IN THE CRIMINAL COURT OF RECORD, in and for Dade County, State of Florida, APRIL Term, 1967.

Case No. 66-6089

THE STATE OF FLORIDA

vs.

MORTIMER NORMAN KORAN

INFORMATION FOR

UNLAWFUL POSSESSION OF COUNTERFEIT DRIVER'S LICENSES

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that MORTIMER NORMAN KORAN, on the 1st day of July, 1966, in the County and State aforesaid, did unlawfully, knowingly and feloniously have in his possession certain fictitious or counterfeit operator's driver's licenses of the State of Florida, to-wit: Approximately one hundred (100) operator's licenses each numbered E-200201, the defendant at the said time and place well knowing that said driver's licenses then in his possession were fictitious or counterfeit as aforesaid, in violation of 322.212 (1) Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

RICHARD E. GERSTEIN,
State Attorney,
Eleventh Judicial Circuit of Florida

STATE OF FLORIDA:

COUNTY OF DADE:

Personally appeared before me, RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged.

RICHARD E. GERSTEIN,
State Attorney,
Eleventh Judicial Circuit of Florida

Sworn to and subscribed before me this 24th day of May, 1967.

J. F. McCracken, Clerk
Criminal Court of Record, Dade County, Florida

Seal: Criminal Court of Record

By Lynda Larurere, D. C.

Defendant MORTIMER NORMAN KORAN.

WITNESSES FOR THE STATE

1. L. D. Brady, 817 Coral Dr., West Palm Beach

2. Keith Hardin, MPD

3. Art Rivers,

4. K. D. Hansen,

5. P. L. Lindsley,

6. D. V. Shalfon,
Treasury Dept., 300 Northeast 1 Avenue

7. Steve Poznanski, PSD

I hereby certify that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this June 6, 1967.

J. F. McCRACKEN,
Clerk Criminal Court of Record

Seal: Criminal Court of Record

By Mary Krissel, D. C.

APPENDIX B

(TITLE OMITTED)

MOTION TO SUPPRESS

COMES NOW the Defendant, MORTIMER NORMAN KORAN, by and through his undersigned attorneys, and files this his Motion to Suppress any and all evidence which the prosecution intends to introduce against the Defendant in the forth coming trial of the above entitled cause, which evidence was obtained as a result of an illegal arrest and/or unlawful search and seizure contrary to the Constitution of the State of Florida and the Constitution of the United States of America.

H. ROBERT KOLTNOW and
GERALD KOGAN
Attorneys for Defendant
1201 Biscayne Building
Miami, Florida 33130

By: Gerald Kogan

I HEREBY CERTIFY that a copy of the foregoing Motion to Suppress was mailed to RICHARD E. GERSTEIN, State Attorney, Attorney for State of Florida, 1351 N. W. 12th Street, Miami, Florida, this 9th day of June, 1967.

Gerald Kogan

APPENDIX C

(And on November 30, 1967, the Court entered herein its JUDGMENT AND SENTENCE, which said JUDGMENT AND SENTENCE was duly filed and recorded on said date by the Clerk of the Court in Criminal Court of Record Minute Book No. 265, on Page 246, and is in his words and figures following, to-wit:)

BENCH DOCKET

Criminal Court of Record
Dade County, Florida

STATE OF FLORIDA

VS.

MORTIMER NORMAN KORAN

CHARGE, UNLAWFUL POSSESSION OF COUNTERFEIT DRIVER'S LICENSES

Case No. 66-6089

JUDGMENT

It appearing unto this Court that you, Mortimer Norman Koran, have been regularly tried and convicted of Unlawful Possession of Counterfeit Driver's Licenses.

IT IS THEREFORE THE JUDGMENT of the law and it is hereby adjudged that you are and stand convicted of the offense as above set forth.

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

SENTENCE

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that you be imprisoned by confinement at hard labor in the STATE PENITENTIARY for a term of THREE (3) YEARS, sentence to run concurrently with the sentence imposed by the Broward County Court of Record, in Case No. 66-10011.

DONE AND ORDERED in open Court at Miami, Dade County, Florida, this 30 day of November A. D. 1967.

/s/ PAUL BAKER, Judge.

Filed this 30 day of November A. D. 1967 and recorded in Criminal Court of Record, Minutes No. 265 on Page 246.

J. F. McCracken, Clerk
By: DORIS MCVAY
Deputy Clerk

DIV. A____B____C____D__/__

BOOK 265 PAGE 246

APPENDIX D

(TITLE OMITTED)

MOTION FOR NEW TRIAL

COMES NOW the Defendant, MORTIMER NORMAN KORAN, by and through his undersigned attorney, and moves this Honorable Court for a new trial on the following grounds:

1. That the verdict of the Jury is contrary to law.

2. That the verdict of the Jury is contrary to the evidence.

3. That the verdict of the Jury is contrary to both, the law and the evidence.

4. That the Court erred in denying the Defendant's Motion to Suppress all tape recorded telephone conversations held between the witness, Art Rivers, and the Defendant, as well as recordings made as a result of non-telephone conversations that took place between the witness, Art Rivers, and the Defendant.

5. That the Court erred in permitting the witness, Sgt. Brady, of the Florida Highway Patrol, to testify as an expert witness as to whether or not the drivers licenses in question were ficticious or counterfeit.

6. That the Court erred in failing to grant the Defendant's motion for a directed verdict at the conclusion of the State's case.

7. That the Court erred in refusing to grant the Defendant's motion for a directed verdict at the conclusion of all the evidence.

8. That the Court erred in failing to grant the Defendant's motion for a new trial when the prosecutor alluded to other crimes committed by the Defendant in his opening statement, when said other crimes were irrelevant to the instant case.

9. That the Court erred in granting the Defendant's motion for a mis-trial when the witness, Art Rivers testified to matters relating to the commissions of other crimes committed by the Defendant when said other crimes were irrelevant to the instant case.

Gerald Kogan
GERALD KOGAN
Attorney for Defendant
1201 Biscayne Building
Miami, Florida

I HEREBY CERTIFY that a copy of the foregoing Motion for New Trial was mailed to RICHARD E. GERSTEIN, State Attorney, Attorney for the State of Florida, 1351 N. W. 12th Street, Miami, Florida, this 23rd day of June, 1967.

Gerald Kogan
GERALD KOGAN

APPENDIX E

(TITLE OMITTED)

NOTICE OF APPEAL

NOTICE is hereby given that MORTIMER NORMAN KORAN, Defendant, by his undersigned attorneys, hereby appeals to the Third District Court of Appeal of Florida, from the Final Judgment entered in this proceeding on the 30th day of November, 1967, wherein the said Defendant was adjudicated guilty of the offense alleged in the Information herein, after a plea of not guilty to said Information and a Jury Trial, and was sentenced to a term of three (3) years. All parties to said cause are called upon to take notice of the entry of this appeal.

DATED this 30th day of November, 1967.

GERALD KOGAN and
H. ROBERT KOLTNOW
Attorneys for Defendant
1201 Biscayne Building
Miami, Florida 33130

/s/ GERALD KOGAN

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was mailed to RICHARD E. GERSTEIN, State Attorney, 1351 N. W. 12th Street, Miami, Florida, this 30th day of November, 1967.

/s/ GERALD KOGAN

APPENDIX F

(TITLE OMITTED)

ASSIGNMENTS OF ERROR

The Defendant, by his undersigned attorneys, makes the following Assignments of Error upon which he will rely for reversal of the Verdict, Judgment and Sentence herein:

1. The Court erred in denying Defendant's Motion To Quash Information.

2. The Court erred in denying the Defendant's Motion To Suppress all tape recorded telephone conversations held between the witness, Art Rivers, and the Defendant, as well as recordings made as a result of non-telephone conversations that took place between the witness, Art Rivers, and the Defendant.

3. The Court erred in permitting the witness, Sgt. Brady, of the Florida Highway Patrol, to testify as an expert witness as to whether or not the drivers licenses in question were fictitious or counterfeit.

4. The Court erred in admitting into evidence in this case a counterfeit dollar bill, which related to other crimes irrelevant to the instant case.

5. The Court erred in denying Defendant's Motion For Mis-Trial when the prosecutor alluded to other crimes committed by the Defendant in his opening statement, when said other crimes were irrelevant to the instant case.

6. The Court erred in denying Defendant's Motion For Mis-Trial when the witness, Art Rivers, testified to matters relating to other crimes committed by the Defendant, when said other crimes were irrelevant to the instant case.

7. The Court erred in denying Defendant's Motions For Directed Verdicts Of Acquittal both at the close of the State's case and at the conclusion of the entire case.

8. The Court erred in denying Defendant's Motion For New Trial.

DIRECTIONS TO CLERK

Defendant, by his undersigned attorneys, as and for his Directions to the Clerk in making up the Transcript of Record on Appeal in this case, the following should be included:

1. Information

2. Pleas of Defendant

3. Motion To Quash Information

4. Order Denying Motion To Quash Information (Minutes)

5. Motion To Suppress

6. Order Denying Motion To Suppress (Minutes)

7. Reporter's Transcript of Testimony on Motion To Suppress to be supplied later

8. Reporter's Transcript of Testimony on Trial to be supplied later

9. Verdict, Judgment and Sentence

10. Motion For New Trial

11. Order Denying Motion For New Trial (Minutes)

12. Notice of Appeal

13. These Assignments of Error and Directions to Clerk

14. All Exhibits introduced at Trial

DESIGNATION OF NECESSARY PARTS OF TRANSCRIBED TESTIMONY

Defendant, by his undersigned attorneys, as and for his Designation Of Necessary Parts Of Transcribed Testimony, herein, directs that the entire Transcript of the Trial, omitting Voir Dire, together with a Transcript of the Testimony on the Motion To Suppress, be included as part of the original Record herein.

H. ROBERT KOLTNOW and
GERALD KOGAN
Attorneys for Defendant
1201 Biscayne Building
Miami, Florida 33130

By H. ROBERT KOLTNOW

I HEREBY CERTIFY that a copy of the above Assignments of Error, Directions to Clerk, Designation of Necessary Parts of Transcribed Testimony, was mailed to RICHARD E. GERSTEIN, State Attorney, 1351 N. W. 12th Street, Miami, Florida, this 18 day of December, 1967.

/s/ H. ROBERT KOLTNOW

APPENDIX G

(TITLE OMITTED)

CASE NO. 67-1021

Opinion filed August 20, 1968.

An Appeal from the Criminal Court of Record for Dade County, Paul Baker, Judge.

Gerald Kogan and H. Robert Koltnow, for appellant.

Earl Faircloth, Attorney General and David Cerf, Assistant Attorney General, for appellee.

Before BARKDULL, HENDRY and SWANN, JJ.

SWANN, Judge.

The defendant below, Mortimer Norman Koran, was charged by information in Dade County, Florida, with the unlawful possession of counterfeit driver's licenses in violation of Fla.Stat. § 322.212(1).

He was found guilty, by a jury, on June 20, 1967, and appeals from his judgment and sentence rendered November 30, 1967 for a term of three years in the state penitentiary.

His first point concerns an alleged violation of his constitutional rights by the introduction into evidence of certain tape recordings which were obtained by government agents using electronic surveillance devices. The recorded conversations were played before the jury after their authenticity had been established.

A part of the tape recording, which was generally objected to by the defendant, had been obtained by an undercover agent, one Rivers, who was wired with a microphone and radio transmitter while conversing with the defendant concerning certain criminal activities. These conversations between the undercover agent and the defendant took place under a bridge in Dade County, Florida. They were transmitted to a building nearby where other agents recorded the conversations. The tape also consisted of a recording of several telephone conversations between the defendant and Rivers, and was used to corroborate the direct testimony of Rivers.

Appellant relies heavily on a recent decision of the United States Supreme Court. See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), decided and released after the trial and judgment rendered in this case.

In Florida, generally, sound recorded evidence of oral conversation is admissible into evidence provided that a satisfactory degree of authenticity has been achieved; Gomien v. State, Fla.App. 1965, 172 So.2d 511, and where, as here, the person causing the recording to be made is the one whose actual testimony is sought to be corroborated by the recording. Hajdu v. State, Fla.App. 1966, 189 So.2d 230.

The recording of the oral conversation between the agent Rivers and the defendant was taken with the consent of one of the parties, Rivers. It was admissible under state law (Gomien and Hajdu, supra) and under federal law. Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963).

As Justice White, in his concurring opinion in Katz, supra, stated:

* * *

"In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, Hoffa v. United States, 385 US 293, 17 L.ed.2d 374, 87 S.Ct. 408 (1966); (2) by a recording device hidden on the person of such an informant, Lopez v. United States, 373 US 427, 10 L.ed.2d 462, 83 S.Ct. 1381 (1963); Osborn v. United States, 385 US 323, 17 L.ed.2d 394, 87 S.Ct. 429 (1966); and (3) by a policeman listening to the secret mircowave transmissions of an agent conversing with the defendant in another location, On Lee v. United States, 343 US 747, 96 L.ed 1270, 72 S.Ct. 967 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. Hoffa v. United States, supra. It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to momorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner 'sought to ex-

clude . . . the uninvited ear,' and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening." [Id, 19 L.ed.2d 589]

* * *

The admissibility into evidence of the recorded telephone conversations between the undercover agent and the defendant brings into play a separate and distinct set of rules in our opinion. Formerly the federal law generally required that such evidence must be suppressed, upon proper motion, in federal courts but not in state courts. Schwartz v. Texas, 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952).

In Katz, supra, the U. S. Supreme Court overruled its earlier decisions of Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) and Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942). It announced that a defendant in federal court charged with violation of a federal statute was protected by the Fourth Amendment to the Federal Constitution and that his federal constitutional rights were violated by the actions of F.B.I. agents in attaching an electronic listening device to a public telephone booth and introducing a recording of such private conversations into evidence over proper objections.

In the instant case one of the parties to the recorded telephone conversations consented to the recording and permitted a recording device to be attached to the telephone. This distinguishes the facts herein from Katz, supra. See Griffith v. State, Fla.App. 1959, 111 So.2d 282; and Barker v. State, Fla. App. 1965, 172 So.2d 857.

The defendant in the instant cause made no specific objections in the trial court that the introduction of these tape recordings into evidence violated **his constitutional rights.** Generally, specific objections to the introduction of evidence must be raised in the court below in order to be properly considered on appeal.

Since specific objections on these grounds were not raised by the defendant in the court below, and since there is no judicial authority for applying Katz retroactively, and inasmuch as there has been no adjudication that Katz applies in state courts, we reject as untimely and unsound defendant's first point for reversal. Parenthetically, we note that no specific objection was made by the defendant to the introduction of the telephone recording on the ground that it violated any federal or state statute. See Lee v. State, 36 U.S.L. Week 4652 (U.S. June 17, 1968).

Defendant contends that the trial court erred in permitting references in the opening statement of the prosecution to other collateral offenses allegedly committed by him. This argument is without merit under the circumstances herein. Williams v. State, Fla. 1959, 110 So.2d 654; Winkfield v. State, Fla.App. 1968, 209 So.2d 468.

Lastly, the defendant seeks reversal because the trial court permitted a Florida Highway Patrolman to qualify as an expert and give his opinion as to the counterfeit driver's licenses. This objection is not substantiated by the record on appeal and no abuse of discretion was committed by the trial judge. See Florala Sawmill Co. v. Smith, 55 Fla. 447, 46 So. 332 (1908); Florida East Coast Ry. Co. v. Lassiter, 59 Fla. 246, 52 So. 975 (1910).

The judgment herein appealed is, therefore,

Affirmed.

APPENDIX H

(TITLE OMITTED)

CASE NO. 67-1021

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

Signature Illegible
Clerk District Court of
Appeal, Third District

cc: Gerald Kogan
Earl Faircloth
J. F. McCracken

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)

APPENDIX I

(TITLE OMITTED)

CASE NO. 37,890

**DISTRICT COURT OF APPEAL,
THIRD DISTRICT**

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

CC: Hon. W. P. Carter
Hon. J. F. McCracken
Messrs. Gerald Kogan & H. Robert Koltnow
Hon. Earl Faircloth
Hon. Melvin Grossman

APPENDIX J

(TITLE OMITTED)

CASE NO. 37,890

Petitioner's petition for rehearing is hereby denied and it is further

ORDERED that petitioner's motion to stay mandate is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

CC: Messrs. Gerald Kogan & H. Robert Koltnow
Hon. Earl Faircloth

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JAN 22 1970
JOHN F. DAVIS, CLERK

in the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 22

MORTIMER NORMAN KORAN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

BRIEF OF THE RESPONDENT

EARL FAIRCLOTH
Attorney General
State of Florida

MELVIN GROSSMAN
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MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 148

MORTIMER NORMAN KORAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

---

BRIEF OF THE RESPONDENT

OPINIONS BELOW

The opinion of the Third District Court of Appeal of Florida, Third District, is reported at 213 So.2d 735 (3rd D.C.A. Fla., 1969). The opinion of the Supreme Court of Florida is reported at 222 So.2d 26 (Fla., 1969).

JURISDICTION

The respondent would most respectfully point out to this Honorable Court that the question presented by the petitioner raises contentions of alleged violations of his rights under both the Fourth and Fifth Amendments of the Constitution of the United States. The respondent would point out to this Honorable Court that the petitioner did not contend any violation of his rights against self-incrimination as guaranteed him by the Fifth Amendment of the Constitution of the United States in the state trial court proceedings.

The motion to suppress filed by him and appearing in Appendix B of his brief clearly is based solely upon his Fourth Amendment rights to be free of unreasonable searches and seizures. While he generally alleged a violation of his self-incrimination rights under the Fifth Amendment of the United States Constitution on appeal, his brief filed with the District Court of Appeal of Florida, Third District, and contained in the record transferred by that court to this Honorable Court, displays no argument or reliance on such contentions.

Moreover, in as much as this ground was not raised by the defendant in seeking to exclude the evidence in the trial court, it was not properly before the District Court of Appeal of Florida, Third District on appeal. *Shea vs. State*, 167 So.2d 767 (Fla., 1964); *Bertone vs. State*, 224 So.2d 400, (3rd D.C.A. Fla., 1969). As this ground was not properly presented and preserved in the State courts, it is not properly raised at this time. *Cardinale vs. State of Louisiana*, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398, (1969).

QUESTION PRESENTED

The respondent would respectfully rephrase the petitioner's question presented as follows:

> WHETHER THIS COURT WILL REVIEW ON CERTIORARI A DECISION OF THE STATE APPELLATE COURT AFFIRMING A CONVICTION BASED IN PART UPON TAPE-RECORDED CONVERSATIONS WHERE THE JUDGMENT AND SENTENCE WERE ENTERED PRIOR TO THIS COURT'S OPINION IN *KATZ VS. UNITED STATES*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576, (1967)?

STATEMENT OF THE CASE

The petitioner was charged by information in Dade County, Florida, with unlawful possession of counterfeit driver's licenses, in violation of Florida Statute § 322.212 (1). At trial certain tape recordings obtained by the use of electronic surveillance devices were introduced into evidence. One portion of the tape recording played to the jury,

> "had been obtained by an undercover agent, one Rivers, who was wired with a microphone and radio transmitter while conversing with the defendant concerning certain criminal activities. These conversations between the undercover agent and the defendant took place under a bridge in Dade County, Florida. They were transmitted to a building nearby where other

agents recorded the conversations. The tape also consisted of a recording or several telephone conversations between the defendant and Rivers, and was used to corroborate the direct testimony of Rivers." *Koran vs. State*, 213 So.2d 735, 736, (3rd D.C.A. Fla., 1969).

ARGUMENT

THIS COURT WILL NOT REVIEW ON CERTIORARI A DECISION OF THE STATE APPELLATE COURT AFFIRMING A CONVICTION BASED IN PART UPON TAPE-RECORDED CONVERSATIONS WHERE JUDGMENT AND SENTENCE WERE ENTERED PRIOR TO THIS COURT'S OPINION IN *KATZ VS. UNITED STATES*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, (1967).

The petitioner sets forth in his petition a curious "but for" proposition. He argues that his conviction would have been set aside under this Court's holding in *Lee vs. Florida*, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1166, (1968), but for that case's solely prospective application. *Fuller vs. Alaska*, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212, (1969). He further argues that his conviction would have been set aside under this Court's holding in *Katz vs. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, (1967), but for this Court's holding in *Desist vs. United States*, 394 U.S. 224, 89 S.Ct. 1030, 22 L.Ed.2d 248, (1969). The respondent would, however, respectfully submit that regardless of the question of retroactivity, *Lee vs. Florida*, supra, and *Katz vs. United States*, supra,

are not applicable to the instant case and that evidence complained of was legally obtained. *Hoffa vs. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374, (1966); *Lopez vs. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 429, (1966).

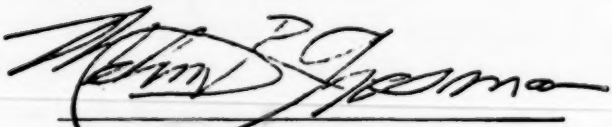
In any event, having duly noted that he is aware of his inability to raise at this time the doctrines established in *Lee vs. Florida*, supra, and *Katz vs. United States*, supra, he then attempts to argue that the use of the recordings in the instant cause to corroborate the testimony of the agent, Rivers, violated his rights against self-incrimination in that it permitted the jury to actually hear a recording of his commission of the offense charged. The respondent would content itself at this point with a reference to the above mentioned fact that this question is not properly before this Court. Moreover, it is firmly established that the right of a defendant to be free of self-incrimination is limited to custodial proceedings and have no applicability to the instant cause. *Miranda vs. Arizona*, 384 U.S. 436, 88 S.Ct. 1602, 16 L.Ed.2d 694, (1966).

CONCLUSION

It is respectfully submitted that the decision of the District Court of Appeal of Florida, Third District, is in complete accord with the applicable decisions of this Court and that the instant petition for writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General
Tallahassee, Florida



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IN THE SUPREME COURT OF THE
UNITED STATES

Case No. 148

MORTIMER NORMAN KORAN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

STATE OF FLORIDA :
: SS
COUNTY OF DADE :

AFFIDAVIT OF SERVICE

I, MELVIN B. GROSSMAN, Assistant Attorney General, State of Florida, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that three copies of Brief of the Respondent to the Supreme Court of the United States was served upon *H. Robert Koltnow and Gerald Kogan,* Attorneys for Petitioner, 1201 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, by mailing the copies of same to them by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this ____ day of January, 1970.

MELVIN GROSSMAN
Assistant Attorney General

Sworn to and subscribed before me at Miami, Dade County, Florida, this ____ day of January, 1970.

NOTARY PUBLIC
State of Florida at Large
My Commission Expires: